

**Revisions to
Model Rules of
Procedure for Fee
Arbitrations-
Request for Public
Comment**

DATE: February 14, 2008

TO: Members of the State Bar Board Committee on Regulation,
Admissions & Discipline Oversight

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration

SUBJECT: Proposed Revisions to the State Bar Model Rules of Procedure for
Fee Arbitrations– Request for Release for Public Comment

Executive Summary

Mandatory Fee Arbitration (MFA) is available through 45 mandatory fee arbitration programs operated by local bar associations in addition to the State Bar's program. Local bar program rules of procedure must be approved by the State Bar's Board of Governors to establish program jurisdiction to arbitrate fee disputes under the Business and Professions Code, section 6200, *et seq.* In an attempt to achieve procedural consistency between programs, expedite the rule approval process, and ensure that programs are in compliance with Minimum Standards and developments in the law, in November 2006, the Board of Governors approved the Model Rules of Procedure for Fee Arbitrations as recommended by the MFA Committee. The local bar associations are not required to but are encouraged to adopt the Model Rules in whole or in part. To date, roughly half of the local programs have already adopted them and more are in the process of adopting them.

After reviewing program rules incorporating the Model Rules of Procedure during the last two years, the MFA Committee identified various Model Rules that were either incomplete or in need of further clarification. The proposed revisions are described in this agenda item. The proposed resolution requests that your Committee circulate for a 60-day public comment period the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations in the form set forth in Attachment A.

I. Background

Pursuant to Business and Professions Code section 6200, *et seq.*, the Board of Governors is charged with establishing, maintaining and administering a

system and procedure for the arbitration of disputes concerning fees, costs, or both, charged by attorneys for their professional services. The Board of Governors adopts rules of procedure to govern the arbitration of attorney fee and cost disputes. The Board ensures that the rules are in compliance with the State Bar's Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards"). The statutory scheme for Mandatory Fee Arbitration (MFA) includes the provision of fee arbitration services through local bar associations in addition to the State Bar. (Bus. & Prof. Code, §6200, subd (d).) To this end, the Board also reviews the fee arbitration rules of procedure of the local bar associations to "...insure that they provide for a fair impartial, and speedy hearing and award." (*Ibid.*)

In California, mandatory fee arbitration is available through 45 local bar programs in addition to the program offered by the State Bar. Prior to the Model Rules, local bar programs operated under vastly different procedural rules, some of which were outdated or in some cases, inconsistent with the MFA statutes and Minimum Standards. To achieve greater inter-program consistency, expedite the review of local bar rules, and ensure that local bar rules comply with Minimum Standards, the MFA Committee developed Model Rules of Procedure for Fee Arbitrations.

At its November 2006 meeting, the Board of Governors approved the Model Rules of Procedure for Fee Arbitrations. Although local bar programs are not required to adopt the Model Rules, the MFA Committee has encouraged them to do so. To date, roughly half of the local bar programs have adopted the Model Rules and additional programs are in the process of adopting them. After reviewing local bar rules that followed the Model Rules, the MFA Committee identified several Model Rules that were either incomplete or in need of further clarification. At its September 27, 2007, November 30, 2007 and January 25, 2008 meetings, the MFA Committee developed proposed revisions to various Model Rules. The MFA Committee requests that the RAD Committee release the proposed revisions identified below and as set forth in Attachment A for public comment.

II. Proposed Revisions to the Model Rules of Procedure for Fee Arbitrations

1. **Right to Correct, Vacate or Confirm Award-** Rule 5.0: expand rule title to include binding arbitration and add new sentence to indicate that awards are subject to being corrected, vacated or confirmed. This addition is made in response to a fee arbitration client who previously commented on other MFA materials to suggest that the program's rules of procedure should clearly set forth this right.

2. **Jurisdiction by the Program-**Rule 11.0: add language that program jurisdiction exists "if a substantial portion of the legal services were performed" in the county where the program is located. This provision tracks the standard for

determining program venue in the event of a dispute included in a recent amendment to the Minimum Standards (paragraph 18) approved March 9, 2007, after the Model Rules were implemented

3. Removal to the State Bar Program-Rule 12: add new language confirming that a party who successfully moves to the State Bar is entitled to a refund of the filing fee paid to the local program.

4. Requests for Arbitration-Rule 14: add new paragraph 14.1 to clarify that arbitration may be requested by “the client, an attorney or a third party entitled to request mandatory fee arbitration.” New paragraph 14.5 sets forth new paragraph 13 of the Minimum Standards setting forth a non-client’s right to MFA and the requirement of program notice to the client in the event of a non-client request for arbitration. The Board approved paragraph 13 effective July 20, 2007, after the Model Rules were implemented.

5. Filing Fee-Rule 15.2: add new rule clarifying that joinder of additional parties shall not increase the filing fee paid to the program. This provision was prompted by the Board’s amendment to the Minimum Standards (paragraph 13) permitting non-client requests for arbitration as long as the program provides notice to the client. The MFA Committee recognizes that notice could well result in the client’s separate request for fee arbitration or to join a pending fee arbitration between the client’s attorney and non-client payor. The MFA Committee believes that charging a joining party an additional filing fee could unduly discourage use of the program and possibly thwart the complete resolution of fee disputes.

6. Consolidations-Rule 20.0: add new language authorizing consolidation of arbitration requested by a client with pending related arbitration absent a showing of good cause. This new language is designed to promote complete resolution of fee disputes in a single arbitration in the event the client files for or joins a pending related fee arbitration between a non-client regarding the client’s matter and the attorney.

7. Stipulation to Single Arbitrator-Rule 31.5: the revision would permit a stipulation to either the panel chair or the second attorney arbitrator in the absence of a panel member in a 3-member panel arbitration. This change tracks the amendment to Minimum Standards paragraph 10 effective March 9, 2007, which does not require that the panel chair be the sole arbitrator but the single arbitrator must be an attorney.

8. Transcripts or Recordings-Rule 37.0: the revision would significantly depart from the current rule, which permits certified shorthand reporting of fee arbitration hearings. The revision would prohibit stenographic recording in addition to currently prohibited audio or video recordings.

Discussion:

The rule permitting a stenographic record of MFA proceedings had been in the Model Rules and in many local program rules for some time. Research,

however, failed to find any authority for such a rule. In fact, California Rule of Court 3.824(b)(1) provides that “[t]he arbitrator may, but is not required to, make a record of the proceedings.” And, Rule 3.824(b)(3) provides that “[n]o other record may be made, and the arbitrator must not permit the presence of a stenographer or court reporter or the use of any recording device at the hearing, except as expressly permitted by (1).”

An arbitration award may be set-aside only on limited grounds (Code of Civil Procedure section 1286.2.) The argument most often articulated in favor of permitting the making of a record is so that there might be a record with which to establish “misconduct” of the arbitrator (C.C.P. section 1286.2(a)). Reported cases where an arbitration award has been set aside for “misconduct” almost universally hold that an arbitrator’s conduct during the hearing, including decisions to admit evidence, rulings on procedural matters, etc., does not amount to misconduct sufficient to justify vacation of the award. *See, Moncharsh v. Heily & Blase* (1993) 3 Cal.4th 1. As a sole exception, Code of Civil Procedure section 1286.2(a)(5) does provide that an award may be vacated where a party has been “substantially prejudiced” by “the refusal of the arbitrators to hear evidence material to the controversy . . .” However, a stenographic record is not required to present this ground. *See, Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 438; *Atlas Floor Covering v. Crescent House & Garden, Inc.* (1958) 166 Cal.App.2d 211, 215. Moreover, pursuant to Rule 3.824(b)(2), any record of the hearing that might evidence the alleged misconduct with respect to the admission of evidence would be inadmissible in court in any event.

More important, Rule 3.824(b)(2) provides that: “Any record of the proceedings made by or at the direction of the arbitrator are deemed the arbitrator’s personal notes and are not subject to discovery, and the arbitrator must not deliver them to any party to the case or to any other person [except an employee or in connection with a subpoena in a criminal prosecution].” Accordingly, any record made for the purpose of proving misconduct would not be admissible for that purpose in any event. Virtually all of the other grounds for vacation of the award either deal with events happening outside the hearing process or are evident from the award or based upon other evidence not generated during the hearing process.

Finally, according to Business and Professions Code section 6200, local program rules need to facilitate a hearing and award process that is “fair, impartial and speedy.” The MFA Committee concluded that permitting a stenographic record would not promote these ends and may detract from them.

9. **Award**-Rules 39.1, 39.6 and 39.8-revision to rule 39.1 clarifies specifically that the nonappearance of a party in non-binding arbitration warrants a statement of the circumstances bearing on willfulness. This revision is consistent with the exception to a right to trial de novo following non-binding arbitration set forth in Bus. & Prof. Code section 6204 (a). New language in rules 39.6 and 39.8 provides a more complete and accurate description of the arbitration panel’s

III. REQUEST FOR A PUBLIC COMMENT PERIOD OF SIXTY (60) DAYS

Pursuant to the State Bar's rule regarding public comment (Title 1, rule 1.10), public comment proposals are normally circulated for ninety (90) days, but the Board may shorten the comment period to a reasonable period that may not be fewer than thirty days.

The Model Rules of Procedure for Fee Arbitrations directly affect a narrow albeit important segment of stakeholders, i.e., the local bar association programs. The MFA Committee will directly solicit the local bar programs (staff and chairpersons) for public comment. Some degree of urgency exists justifying a shortened comment period to provide guidance to the local bar programs. A 60 day public comment period would provide sufficient time to receive comments on the proposed revisions, review any comments at the MFA Committee's May 23, 2008 meeting, and make a final recommendation for the July 10-11, 2008 RAD Committee and Board meetings.

For these reasons, it is recommended that the RAD Committee authorize the release of the proposed revisions to the Minimum Standards as set forth above for a shortened period of 60 days.

IV. Effective Date of Approval

The proposed revisions to the Model Rules of Procedure for Fee Arbitrations would become effective upon final consideration by the Board of Governors, after recommendation by the RAD Committee following the public comment period.

V. Fiscal/Personnel Impact

None.

VI. Impact on Board Book/Administrative Manual

None.

VII. State Bar Rules Impact

None.

VIII. Proposed Resolution

The MFA Committee requests that your Committee release for public comment the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations in the form set forth in Attachment A for a 60-day comment

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period. If you agree with this recommendation, your adoption of the following resolutions would be appropriate:

“RESOLVED, that the Board Committee on Regulation, Admissions and Discipline Oversight hereby authorizes the release of the proposed revisions to the State Bar Model Rules of Procedure for Fee Arbitrations, in the form attached hereto as Attachment A, for a public comment period of 60 days; and

FURTHER RESOLVED, that authorization by the Board Committee on Regulation, Admissions and Discipline Oversight for publication for public comment is not, and shall not be construed as a recommendation or approval by the Board of Governors of the materials published.”